Editor's note: appealed - rev'd, Civ.No. 81-A-272 (D.Colo. Jan. 5, 1982)

MONSANTO CO.

IBLA 80-511 Decided December 15, 1980

Appeal from decision of the Colorado State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease, C-12219.

Affirmed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Termination

   The applicable statute limits the authority of the Department of the Interior in reinstating leases only to those situations where it is shown that the failure to pay the rental timely was either justifiable or not due to a lack of reasonable diligence. Reasonable diligence normally requires sending or delivering payment to the proper office sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. Late payment of the rental is justifiable only where failure to make timely payment is the result of causes beyond the control of the lessee, and simple inadvertence in mailing the payment to the wrong office does not justify failure to send timely payment to the proper office.

APPEARANCES: David C. Knowlton, Esq., Clanahan, Tanner, Downing, and Knowlton, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Monsanto Company, hereinafter appellant, appeals from the decision of the Colorado State Office, Bureau of Land Management

(BLM), which denied its petition for reinstatement of oil and gas lease C-12219 that was held to have terminated by operation of law for failure to pay the annual rental on or before the anniversary date of the lease, February 1, 1980, as required by 30 U.S.C. § 188 (1976); 43 CFR 3108.2-1(a).

On January 29, 1980, the BLM State Office in Cheyenne, Wyoming, received a check from appellant in the amount of $320. The check represented payment of advance rental for oil and gas lease C-12219, which had an anniversary date of February 1, 1980. The check was sent in error to the Wyoming State Office, since the Colorado State Office is the proper office having jurisdiction over oil and gas leases in that State, 43 CFR 1821.2-1(d).

In its statement of reasons on appeal appellant asserts that a major winter snowstorm in Cheyenne, Wyoming, on Friday, January 25, 1980, caused the Wyoming State Office to be closed until January 29, 1980, thereby delaying receipt of its misdirected payment. Appellant further asserts that but for the snowstorm its misdirected payment would have been received in the Wyoming State Office in sufficient time to have that office either transmit the payment to the Colorado State Office before the anniversary date or to notify lessee of its error.

On Friday, February 1, 1980, the Wyoming State Office sent a transmittal letter, containing appellant's misdirected annual advance rental payment to the Colorado State Office. The State Office in Denver, Colorado, received the transmittal letter and annual advance rental payment on Monday, February 4, 1980, 3 days after the due date. The Colorado State Office thereupon notified appellant that lease C-12219 had terminated by operation of law for failure to timely file the rental. Appellant petitioned for reinstatement, which was denied by the State Office. The decision stated in part:

> To qualify for reinstatement of a lease as provided by 43 CFR 3108.2-1(c), the lessee must show that failure to make timely payment was * * * either justifiable or not due to lack of reasonable diligence on the part of the lessee. 30 U.S.C. 188(c). Mailing a payment to a wrong office does not constitute reasonable diligence and cannot be considered justifiable.

[1] On appeal appellant contends:

> In the State BLM Decision affecting our lease, it was stated that despite any valid justifications that might have existed for the late arrival of the payment in the Denver office, the original misdirection of the payment

> precluded any justification for its late arrival. Such an interpretation is inconsistent with both the regulations and prior IBLA decisions. The statute and the regulations provide for a two-prong test by which a lessee may justify the untimely payment of a delay rental. As previously stated, the lessee must show either that he was reasonably diligent in sending or delivering said payment, or, in the alternative, show that the failure of the payment to arrive timely was justifiable under the circumstances of the particular case. The position taken by the State BLM decision precludes the presentation of evidence justifying the untimely arrival of a delay rental payment if the lessee has initially erred in the delivery. However, the correct interpretation of 30 USC § 188(c) is that the lessee also is entitled to justify such tardiness by showing that circumstances intervened after the payment was sent by the lessee that altered the normal course of events and consequently caused the payment to be late. Nowhere in the statutes, regulations, or prior decisions of the Interior Board of Land Appeals is a lessee required to comply with any procedural steps regarding the delivery of the rental payment. Rather, the statute focuses on the time at which the payment arrives. The statutes and the regulations state that if there is any justification (extenuating circumstances or reasonable diligence) for the payment arriving late, the lease may be reinstated. Therefore, regardless of an initial error on the part of the lessee, it is possible, given the proper circumstances, for a lease to be reinstated.

Appellant's contention is a misstatement of the law. Where a lease terminates by operation of law for failure to pay timely the annual rental, the applicable statute limits authority of the Department in reinstating leases only to those situations where it is shown that the failure to pay the rental timely was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1976). "Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment." 43 CFR 3108.2-1(c)(2). Because, under regulation, a check does not constitute payment unless it is received at the proper office, it necessarily follows that the requirement of "sending or delivering payment" cannot be met by sending the check to the wrong office. Thus, mailing the check to the wrong office 1/ logically and legally precludes a finding of reasonable diligence. Gretchen Capital, Ltd., 37 IBLA 392 (1978).

1/ The need to conduct business at the office having appropriate jurisdiction has been long recognized. See, e.g., Mathews v. Zane, 7 Wheat. 164, 5 U.S. 244 (1822).

The Department has consistently held that a late payment of rental is justifiable within the meaning of the statute only where the failure to make timely payment is the result of causes beyond the control of the lessee and simple inadvertence has never been held by this Board to justify late payment. See Gretchen Capital, Ltd., supra; Lone Star Producing Co., 28 IBLA 132 (1976); Hiko Bell Mining & Oil Co., Inc., 24 IBLA 255 (1976), rev'd, Hiko Bell Mining and Oil v. Andrus, Civ. No. C-76-138 (D. Utah April 4, 1978); Vern H. Bolinder, 17 IBLA 9 (1974); Louis Samuel, 8 IBLA 268 (1972). The Board's use of this standard has been sustained in the Federal courts. See, e.g., Laatz v. Morton, Civ. No. 03266 (E.D. Mich. 1975); Maisano v. Morton, Civ. No. 39720 (E.D. Mich. 1973). Appellant admits that the check was sent to the wrong office out of simple inadvertence:

> Monsanto's Houston office, which is the office responsible for payment of all delay rentals paid by this company, prepared a check payable to the Bureau of Land Management, P.O. Box 1828, Cheyenne, Wyoming 82001, in the amount of $320.00, being check number L00428 dated January 23, 1980.
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> On the morning of January 24, 1980, this check was mailed to the Bureau of Land Management in Cheyenne, Wyoming, by certified mail, return receipt requested, under certified number PO 6306132.

(Statement of Reasons, p. 2). Under the standards articulated in the above-cited decisions, contrary to appellant's argument, failure to pay the annual rental for an oil and gas lease in a timely fashion is not justifiable where the lessee mistakenly directs its payment to the wrong BLM State Office.

Appellant argues that the present case is similar to the situation presented in Margaret C. Hose, 19 IBLA 307 (1975). In Hose the annual advance rental payment was due on October 1, 1974, in the Wyoming State Office, BLM. The payment arrived one day late on October 2, 1974. The lessee inadvertently addressed the payment to the Colorado State Office in Denver. However, she included, on the envelope, the post office box number and zip code of the State Office in Cheyenne, Wyoming. The post office delivered the payment to the Denver Office, disregarding the Cheyenne, Wyoming zip code. With regard to Hose, appellant makes the following assertion:

> The case at hand presents a corollary fact pattern. In the present case, just as in Hose, Id, a mistake was made by the lessee (Monsanto) prior to the mailing of the payment. Despite the initial mistakes, both payments would have been received in the proper state offices on or before

> their respective anniversary dates given the "normal course of events." However, in both cases, intervening circumstances arose delaying the delivery of the delay rental payments. Although the Board could have adopted the position that "but for" the mistake of the lessee the intervening event would not have arisen, the Board in the Hose case chose not to interpret the statute in such a restrictive manner. The same decision should be reached in the present case.

(Statement of Reasons, p. 5). We reject appellant's argument.

In the instant case, appellant, through its own inadvertence, misdirected the advance annual rental payment to the Wyoming State Office, including the proper post office box, state, and zip code for that office. Unlike the situation referred to in the Hose decision, the postal service delivered appellant's payment to the party to whom it was addressed. With regard to misdirected payments this Board held in Hose, supra, that late payment can be excused only in instances where the error rests with the post office, and not the inadvertence of the lessee. This is the only interpretation consistent with principles established in earlier decisions sustained on judicial review.

Although not addressed by appellant, we have considered the impact of Richard L. Rosenthal, 45 IBLA 146, decided January 23, 1980. In Rosenthal the payment was sent to the Colorado State Office, rather than to the correct office, the Montana State Office. The payment was received by the former some 14 days prior to the anniversary date, but the Colorado Office took no action either to return the check to the sender or to forward it to the correct office until the anniversary date of the lease when it forwarded the payment to the Montana State Office. The rationale of Rosenthal is that the negligence of BLM employees was an equally causative factor in the lessee's failure to pay rental timely. In the case at bar, no negligence of BLM employees is alleged or shown. The check had been mailed on January 24, 1980, from Houston, Texas, to Cheyenne, Wyoming. The "normal" mail delivery time between these points is asserted to be 2 days. The storm hit Cheyenne on January 25. But even assuming the absence of a storm, a delay in further transmittal by the Cheyenne Office from January 26, 1980 (a Saturday), until February 1, 1980 (a Friday), would not necessarily be unreasonable. Cheyenne is a very busy office with a tremendous volume of mail. We find Rosenthal not controlling here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

I concur:

Bernard V. Parrette
Chief Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

Reasonable diligence is not absolute diligence. 1/ If appellant had been absolutely diligent there would be no need for consideration of the effect of the statute. Congress contemplated that a lessee or a responsible employee may make a human error and lessee still be reasonably diligent. See, e.g., Richard L. Rosenthal, 45 IBLA 146 (1980); Margaret C. Hose, 19 IBLA 307 (1975).

Here the payment, due February 1, 1980, was mailed some 8 days in advance of the date, although to the wrong BLM office. Except for the unusual blizzard which closed the BLM office for 4 days, the misdirected payment would, in all probability, have been forwarded to the correct office and would have been timely received.

In adjudicating a similar problem of a misaddressed payment, the Board's decision in Hiko Bell Mining and Oil Company, 24 IBLA 255 (1976), was reversed, and a more liberal approach was followed based in part upon legislative history. In Hiko Bell Mining and Oil v. Andrus, Civ. No. C-76-138 (D. Utah April 4, 1978), the District Court stated:

> The issue before the court is whether the Secretary of Interior's decision not to reinstate the lease was based on substantial evidence or whether the decision was arbitrary, capricious or an abuse of discretion. The court finds that there is no substantial evidence in the record to support the conclusion that plaintiff's failure to timely make its rental payment to the Utah State Office of the BLM was either not justifiable or due to lack of reasonable diligence on plaintiff's part. Furthermore, the court concludes that the Secretary's decision is not consistent with the legislative mandate of 30 U.S.C. § 188(c).
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> The court has examined the legislative history surrounding the passage of 30 U.S.C. § 188(c) and finds that the instant case is the very type of situation intended to be covered by that amendment to the Mineral Leasing Act. Congressman Wayne Aspinall, Chairman of the House Committee on Interior and Insular Affairs [Committee], in urging passage of the amendment stated:

1/ E.g., H.R. Rep. No. 91-1005, 91st Cong., 2d Sess. 2 (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 3002, 3004. An additional analysis of legislative history was set forth by appellant in Fuel Resources Development Co., 43 IBLA 19, 26-34 (1979) (dissent). Appellants discussion at 28-29 is especially pertinent.

> As I recall, we have brought [public or private relief] bills before this body where the rental was short by 15 cents or 20 cents and in many cases the shortage was a few dollars or less. In other situations the rental was mailed in ample time but the letter was misdirected to the wrong office. These are some of the situations that this proposed bill would eliminate. 2/ [Emphasis in original.]

Congressional Record-House, April 20, 1970, at 12414. * * * Furthermore, the Report of the Committee states that "[t]he Committee expects the Secretary of the Interior to examine carefully each petition for reinstatement and to adjudicate favorably only those cases where it is clearly shown that the failure was, as indicated above, either justifiable or not due to lack of reasonable diligence." H. R. Rep. No. 91-1005 reprinted in [1971] U.S. Code Cong. & Ad. News 3002, 3005.

Defendant correctly states that the proper standard on review is whether the Secretary's decision is arbitrary or capricious or unsupported by substantial evidence. 5 U.S.C. § 706(2)(A) & (E). It is essential, therefore, to give careful scrutiny to the decision of the IBLA. Hiko Bell Mining & Oil Company, Inc., [supra].

The IBLA opinion states that:

> An oil and gas lease terminated for failure to make timely rental payment may be reinstated by the Secretary of the Interior where, among other requirements, it is "shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee * * *. 30 U.S.C. § 188(c) (1970).

2/ Chairman Aspinall's statement was also cited as a reason for granting relief in C. E. Knowles, 3 IBLA 307, 311-12 (1971), which was the case decided in closest proximity to the 1970 adoption of 30 U.S.C. § 188(c) (1976). The Board therein also cited Chairman Aspinall's concluding statement that the "legislation is needed to give the Secretary of the Interior a certain amount of discretionary authority to reinstate leases and to relieve Congress of the burden of considering many individual private bills." In later cases the Board, without citing Knowles, adopted a more restrictive approach. E.g., Louis Samuel, supra at 273, in which the equitable aspects of the statute were discussed.

The IBLA then states, in a most conclusory manner, that

> [r]easonable diligence in sending a rental payment due on the anniversary date means transmitting the payment so that it will normally be received in the appropriate office on or before the anniversary date considering the method of transmission, normal delays in handling, and the distance involved. For purposes of reinstatement an adequate tender of the rent usually requires that the envelope bearing the rental payment be properly addressed. A payment that is late because it was inadvertently sent by the lessee to the wrong address is neither justifiable nor the result of reasonable diligence. Cases of simple inadvertence are not generally justifiable or diligent.

24 IBLA at 257. (Citations omitted; emphasis added.)

There is no indication in the opinion as to why the IBLA determined that this plaintiff's untimely payment was not justifiable or due to lack of diligence. The IBLA merely concludes that since it was received two days late by the Utah State Office of the BLM plaintiff did not exercise diligence. The automatic application of such a standard would render nugatory the very purpose sought to be achieved by 30 U.S.C. § 188(c) which is to "soften some of the rigors of the present law providing for automatic termination of a Federal oil and gas lease if the lessee fails to make timely payment of the full rental due under the lease." U.S. Code Cong. & Ad. News, supra at 3002.

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* * * The court concludes that a reasonable person in the exercise of reasonable diligence could find the regulations and lease provisions confusing and might be justified in sending this rental payment to the wrong office. Certainly in the instant case plaintiff appears to have made a diligent effort to get its payment to the BLM on time and in the correct amount. [Emphasis added.]

Appellant's lease herein contains the same provision as the Court found confusing in Hiko Bell, but in neither case did the appellant

actually indicate that it was misled into filing in the wrong office. 3/

The Board in Gretchen Capital, Ltd., 37 IBLA 392 (1978) stated that it declined to follow the District Court in Hiko:

> The Department has consistently held that a late payment of rental is justifiable within the meaning of the statute only where the failure to make timely payment is the result of causes beyond the control of the lessee and simple inadvertence has never been held by this Board to justify late payment. See Lone Star Producing Co., 28 IBLA 132 (1976); Hiko Bell Mining & Oil Co., Inc. supra; Vern H. Bolinder, 17 IBLA 9 (1974); Louis Samuel, 8 IBLA 268 (1978). The Board's use of this standard has been sustained in the Federal courts. See, e.g., Maisano v. Morton, Civil No. 39720 (E.D. Mich. 1973); Laatz v. Morton, Civil No. 03266 (E.D. Mich. 1975). * * *
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> * * * Appellants draw support from the unpublished court decision reversing the Board's decision in Hiko Bell Mining & Oil Co., Inc., supra. * * * After holding the regulation to be ambiguous, the court held that the lessee had exercised reasonable diligence and that failure to pay the rental timely was justifiable. However, this case does not involve a Utah lease, and the decision does not constitute binding precedent for other Federal judges. Hartley v. Sioux City and New Orleans Barge Lines, Inc., 247 F. Supp. 1015 (W.D. Pa. 1965), aff'd, 379 F.2d 354 (3d Cir. 1967); see United States v. Mathies, 350 F.2d 923 (3d Cir. 1965); see also Taylor v. Cox, 315 F. Supp. 1316 (E.D. Va. 1970). We decline to follow it because it conflicts with principles of construction applied in other cases cited above which have been been judicially sustained.
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> Appellants cite the [above] statement on the reinstatement provision by Representative Wayne Aspinall as a basis for concluding that their lease should be reinstated * * *. [4/]

3/ Letter, Interior Deputy Solicitor Ferguson to Assistant Attorney General Moorman, August 11, 1978:

"We again point out that plaintiff never asserted before this agency that it was in any way misled by the regulations on which the Court relied. In fact, it admitted that it knew in which office the payment was to be filed, and misfiled by inadvertence alone."

4/ See District Court decision in Hiko Bell, quoted supra.

In Margaret C. Hose, 19 IBLA 307, 309 (1975), the Board considered the import of this statement:

> We note that Representative Aspinall's reference to "misdirected" is ambiguous, namely, it is not clear whether he is referring to misdirection by the post office, the lessee or by both. The Board concludes that adequate tender of payment requires that a letter be properly addressed. Accordingly, we hold that proper construction of the term "misdirected" excuses late payment only in instances where the error rests with the post office, and not the inadvertence of the lessee.

We further note that this is the only interpretation consistent with principles established in earlier decisions sustained on judicial review.

I submit that the Hiko District Court's interpretation of Chairman Aspinall's statement is the more persuasive. As the Court found, the statement was intended to include a misdirection by a lessee. There are no limiting words in the Chairman's words "but the letter was misdirected to the wrong office." While other "wrong offices" might be included, there seems no question that the Chairman was referring to the wrong BLM office. If Congressman Aspinall had intended to primarily refer to other than Department offices, he would have used the words "wrong address."

The Chairman could not possibly have referred to a situation where a rental payment properly addressed to one state office was, by the post office, misdirected in some incredible manner so that it arrived at an entirely different state office.

Contrary to the above statement from Gretchen Capital, there have been no judicial rulings at variance with the above-cited legislative history as to misdirected payments. Maisano v. Morton, supra, had nothing to do with misdirected payments but involved a lessee's difficulty in contacting an assignor and assignor's assurances that a late payment would be acceptable. Laatz v. Morton, also relied on in Gretchen Capital, concerned whether deaths in lessee's family were sufficiently proximate to the payment due date as to render a late payment justifiable, and whether a misunderstanding of rental requirements was justifiable. Lone Star Producing Company, 28 IBLA 132, 141, 151 (1976) (dissent).

Hiko Bell is the only judicial interpretation of legislative history on otherwise timely payments which were sent to the wrong office.

As to a complete failure of a secretary to carry out payment instructions, and reassurances by her that payment had been made, there is disagreement in Federal courts in Utah and Nevada in the interpretation of 30 U.S.C. § 188(c) (1976). The two recent district court decisions are Ramco, Inc. v. Andrus, Civ. No. 79-007 (D. Utah 1979), appeal docketed No. 80-1100 (10th Cir. 1980); and Ram Petroleums, Inc. v. Andrus, 478 F. Supp. 1165 (D. Nev. 1979), appeal docketed No. 79-4886 (9th Cir. 1979). Especially because of the unusual snowstorm here, I would expect that a Tenth Circuit District Court would be guided by the approach of the Utah District Court in Hiko Bell, supra, and make a finding of reasonable diligence. I would so hold.

As to appellant's petition for an extension under 43 CFR 3108.2-1(d), this matter should be left for initial determination by BLM.

Joseph W. Goss
Administrative Judge